90-102

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LIBERTY COUNTY, FLORIDA, ET AL,
AND
LIBERTY COUNTY SCHOOL BOARD, ET AL,
Petitioners,

versus

GREGORY SOLOMON, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS, ELEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE COURT'S THORNBURG V. GINGLES OPINION BE CLARIFIED, AS APPLIED TO THE INSTANT CASE, CONCERNING THE LEGAL EFFECT OF THE THREE GINGLES THRESHOLD FACTORS?

II. SHOULD THE COURT'S GINGLES OPINION BE CLARIFIED, AS TO HOW SMALL A MINORITY MAY BE ENTITLED TO A REMEDY FOR ALLEGED VOTE DILUTION, IN VIEW OF THE DISCLAIMER OF ANY RIGHT TO PROPORTIONAL REPRESENTATION IN THE VOTING RIGHTS ACT OF 1965?

III. MAY THE COURT OF APPEALS MAKE CONCLUSIVE FACTUAL FINDINGS, AS A MATTER OF LAW, AS TO THE THRESHOLD FACTORS ADOPTED IN GINGLES, IN A CASE WHICH WAS TRIED BEFORE GINGLES WAS DECIDED, WHEN THE EVIDENCE WAS DISPUTED AND WHEN THE TRIAL COURT DID NOT MAKE FINDINGS AS TO ALL OF SUCH FACTORS?

PARTIES

The Petitioners are:

Liberty County, Florida

Gene Free, Chairman, Commissioner; Joe Burke, James E. Johnson, J. L. Johnson, and John T. Sanders, Commissioners of Liberty County; their successors and agents; all in their official capacities

Liberty County School Board, Florida

Ras Hill, Chairman; Joseph Combs, Tommy Duggar, W. L. Potter, and Herbert Whittaker, members of the Liberty County School Board; their successors and agents; all in their official capacities

The Respondents are:

Gregory Solomon, Patricia Beckwith, Raleigh Brinson, and Earl Jennings

All others similarly situated

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JURISDICTION

The en banc judgment and opinions for which review is sought were entered on the 5th day of April, 1990.

No rehearing was sought on the en banc decision and judgment.

Review by this Court of the judgment and opinions of the Court of Appeals is specifically authorized by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. s 1973 (Section 2 of the Voting Rights Act of 1965, as amended):

§ 1973. Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members

of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered; Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

Liberty County is located in Northwestern Florida. According to the 1980 United States Census, it has the following population and voting age population, by race:

	Total	White*	Black
Population	4260	3789	471
% of total		88.94%	11.06%
Voting age population	2990	2678	312
% of total		89.57%	10.43%
% 18 years or older (voting age)	70.20%	70.66%	66.24%

* Includes fewer than 10 persons of other races (neither white nor black)

The Board of County Commissioners of Liberty County and the Liberty County School Board are each comprised of five members. The County is divided into five districts, from each of which a resident is elected to each body. The entire

County electorate, however, votes for one candidate from each district. Members of both bodies are elected for staggered four-year terms. A candidate must receive a majority of his or her party's county-wide vote to be selected as the party's nominee, but in the general election there is no majority vote requirement. (A4-A5)

In 1985, the residency districts for County Commissioners and for School Board members were changed in accordance with a plan proposed by the Respondents. (A254) By the Respondents' plan, 423 of the County's black residents are now located in District I, which leaves less than 50 black persons residing in the other four districts combined. (A254) The trial court found that blacks comprised 49 percent of the total population of District I and 46.2 percent of the

registered voters of District I. (A254) No finding was made as to the District I percentage of voting age population which was black.

Respondents filed their class action complaints in the United States District Court for the Northern District of Florida, Tallahassee Division, against Liberty County, the County Commission members, the Liberty County School Board, and the School Board members, alleging that the at-large system of electing the two five-member bodies unlawfully diluted black voting strength. Jurisdiction was alleged under 28 U.S.C. ss 1331, 1343, 2201, and 2202 and 42 U.S.C. ss 1971(d) and 1973(e).

The Petitioners answered by denying that the at-large system was a violation of Section 2 of the Voting Rights Act. By

stipulation of the parties, the two cases were consolidated for trial.

The distinction between percentages of black population and black voting age population did not appear to be legally significant at the time this case was tried. Trial was held on March 25 through March 28, 1986. (A216) On June 30, this Court decided Thornburg v. Gingles, 478 U.S. 30 (1986), which considerably magnified the importance of population statistics in Section 2 Voting Rights Act cases.

On May 4, 1987, the district court entered judgment for the Petitioners, finding that, based on the totality of the circumstances, the at-large election system in Liberty County did not violate Section 2 of the Voting Rights Act. (A214-A278)

Respondents filed their notice of

appeal on May 28, 1987. On December 12, 1988, the original panel of the Court of Appeals vacated the district court judgment and opinion and remanded for further proceedings. (A129-A231)

On the motion of Petitioners, the Court of Appeals granted a rehearing en banc and, on April 26, 1989, vacated the original panel opinion. (A127-A128)

After en banc review, the Court of Appeals, on April 5, 1990, vacated the district court final judgment and remanded, holding that, as a matter of law, the Respondents had satisfied the three Gingles factors. The Court was, however, evenly divided as to whether the Respondents were forthwith entitled to a judgment or were still subject to a totality-of-circumstances determination by the district court. (A1-A2)

ARGUMENT

I. SHOULD THE COURT'S THORNBURG V. GINGLES OPINION BE CLARIFIED, AS APPLIED TO THE INSTANT CASE, CONCERNING THE LEGAL EFFECT OF THE THREE GINGLES THRESHOLD FACTORS?

The Eleventh Circuit Court of Appeals, in a unanimous en banc opinion issued April 5, 1990, remanded the instant case to the district court for further proceedings in accordance with Thornburg v. Gingles, 478 U.S. 30 (1986). Though unanimous in vacating the district court's judgment and remanding the case, the Court was sharply divided over the legal effect of the three threshold factors adopted in Gingles for Voting Rights Act claims based on multi-district elections:

> We hold, as a matter of law, that the appellants have satisfied the three Gingles factors . . . but we are divided on the legal effect of

proving those factors. Because we are divided in our interpretation of Gingles and section 2 of the Voting Rights Act . . . we do not specifically direct the district court on how to proceed on remand.

(A2-A3)

The Court split five to five concerning the legal effect of the Gingles factors in three concurring opinions (A4-A39; A40-A115; A116-A125), with the specially concurring opinions of Judge Kravitch and Chief Judge Tjoflat representing the respective positions of the divided Court.

It should again be noted that the trial of this case was concluded prior to this Court's decision in Gingles. The Court of Appeals, however, made findings of fact for the district court, as a matter of law, as to the three Gingles threshold factors, while simultaneously being unable to give instructions as to

the legal effect of such findings. This issue of appellate court fact-finding is addressed separately below.

While there were several opinions by Justices of the Court in Thornburg v. Gingles, that decision appears to resolve two issues: (1) that the three identified factors are a "necessary precondition" for a successful vote dilution claim, as there simply cannot be vote dilution without them, and (2) that the ultimate determination of vote dilution is still based on the totality of the circumstances, as intended by Congress. (This appears to be the interpretation given Gingles by the district court below.)

Judge Kravitch's construction and application of the three Gingles factors, however, is that they are conclusive and

dispositive. This approach is best illustrated by her own words:

> As is evident in my discussion below, proof of the three Gingles factors is both necessary and, in this case, sufficient for a section 2 vote dilution claim. (A18)

This specially concurring opinion, joined by four members of the Court of Appeals, arrived at this conclusive view of Gingles from a somewhat brief discussion of the background of the instant case and the history of the Voting Rights Act of 1965. (A4-A17) The opinion highlighted the development of voting rights claims under the "results test" and specifically emphasized the case law as developed under White v. Regester, 412 U.S. 755 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), aff'd. sub nom. East Carroll Parrish School Bd. v. Marshall, 424 U.S. 636 (1976).

Judge Kravitch's opinion also discussed Mobile v. Bolden, 446 U.S. 55 (1980), pointing out the renunciation of the results test in favor of the position that "discriminatory purpose was a necessary element of a claim for vote dilution." (A9) The Bolden decision, of course, prompted the 1982 congressional amendment of section 2 of the Voting Rights Act, restoring the pre-Bolden standard.

Judge Kravitch further reviewed the "Senate Report" factors derived from White and Zimmer, supra, and endorsed by Congress in amending section 2, which--though not an exhaustive list--embody the results test in light of the totality of the circumstances. (A12-A15) Significantly, the opinion did not again mention or discuss the results test, the Senate

Report factors, or the totality of the circumstances, except to state:

> Although a district court may consider the totality of the circumstances, those circumstances must be examined for the light they shed on the existence of the three core Gingles factors.
>
> (A17-A18)

The opinion completely ignored the detailed discussion of the totality of the circumstances by the district court. Instead, the opinion concluded with an application of the Gingles factors to the instant case, finding the evidence sufficient as a matter of law to establish a Voting Rights Act violation:

> In conclusion, the district court erred in failing correctly to apply the Gingles test. Having reviewed the uncontroverted evidence below, I conclude that appellants have met all three Gingles requirements. This is all the Supreme Court requires, and I may require no more. (Emphasis added.)
>
> (A26)

Judge Tjoflat's different interpretation and application of the three Gingles factors is best summarized as follows:

> In summary, Gingles stands for the following propositions:
>
> 1. If the plaintiff cannot prove (1) the existence of a large and compact minority group, (2) that the group is politically cohesive, and (3) that the white majority typically votes as a block, he cannot make out a claim under section 2.
>
> 2. If the plaintiff does prove these three factors, and the defendant offers nothing in rebuttal, the plaintiff wins.
>
> 3. If the plaintiff proves the three factors, and the defendant offers proof of other objective factors in rebuttal, the court must be satisfied, before it may rule in favor of the plaintiff, that, under the totality of the circumstances, the minority group is denied meaningful access to the political process "on account of race or color."
>
> (A101-A102)

Judge Tjoflat's concurring opinion,

therefore, construed the Gingles factors as threshold requirements, essential to the making of a claim under section 2 of the Voting Rights Act but not per se sufficient as a matter of law. Judge Tjoflat's opinion provided a detailed analysis of the legislative history of the Voting Rights Act and the development of its corresponding case law. (A45-A103) More than summary treatment, however, is unfortunately beyond the scope of this Petition.

Four criticisms of Judge Kravitch's approach are evident in Judge Tjoflat's opinion:

1. The mechanical application of the Gingles factors as both necessary and sufficient produces a tautological and inflexible rule of law, allowing plaintiffs to establish an irrebuttable

prima facie case. (A91, A100, A107)

2. The Kravitch approach effectively eliminates the totality-of-the-circumstances test. (A107) As noted by Judge Tjoflat, inclusion of Senator Dole's proposed language expressly incorporating the totality-of-the-circumstances test was essential to passage of the 1982 amendment to section 2 of the Voting Rights Act. (A273-A274)

3. Judge Kravitch's mechanical application of the Gingles factors renders nonsensical this Court's discussion of the totality of the circumstances in Gingles after the Court noted the success of the Gingles plaintiffs in proving the three factors, and after it approved the district court's careful consideration of the totality of the circumstances. (A101)

4. The Kravitch approach creates a right to proportional representation for all compact and cohesive minority groups constituting a majority of an appropriately designed single-member district. (A105-A106, A112-A114)

Additionally, Judge Tjoflat enumerated the following important questions neglected by the Kravitch concurrence:

> When could a section 2 plaintiff lose even though he has proven the three Gingles factors? How did Judge Kravitch decide in this case that the appellants' evidence was sufficient to require judgment in their favor as a matter of law? How may a defendant rebut a section 2 claim when the three Gingles factors have been proven?
>
> (A43)

It should not be assumed, however, that Judge Tjoflat and the other Judges joining his opinion view Gingles as clearly and straightforwardly as did the

district court in this case. Judge Tjoflat's specially concurring opinion includes the four-step test outlined in his opinion for the original panel. (A40, A108) That test is: (1) Is the minority underrepresented in proportion to its percentage of the total electorate? (2) Does the minority group have sufficient geographic and political cohesion to permit one or more minority-controlled single-member districts? (3) Is the current electoral system driven by racial bias? and (4) Will the system continue to deny minorities equal access to the political system? (A158-A159) According to the panel Judges, the various totality-of-the-circumstances factors mentioned in Gingles and earlier opinions relate only to the third question. (A108, A158-A159)

The Eleventh Circuit Court of Appeals, in Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), has also arrived at yet another interpretation of Gingles, which appears to be closer to the clear and straightforward manner in which the district court herein applied it.

In sum, the completely divergent and conflicting interpretations of Gingles by the Court of Appeals of the Eleventh Circuit create a compelling need for clarification and guidance by this Court. The need for such clarification and guidance is even more significant in light of the 1990 U.S. census, scheduled for publication in April of 1991, and its potential impact on Voting Rights Act claims. Whether or not the three Gingles factors are to be mechanically and

conclusively applied, based on the new census data, will be an extremely important issue to every State and political subdivision, but particularly to the Petitioners and others who could find themselves greatly affected by very slight changes in numbers.

II. SHOULD THE COURT'S GINGLES OPINION BE CLARIFIED, AS TO HOW SMALL A MINORITY MAY BE ENTITLED TO A REMEDY FOR ALLEGED VOTE DILUTION, IN VIEW OF THE DISCLAIMER OF ANY RIGHT TO PROPORTIONAL REPRESENTATION IN THE VOTING RIGHTS ACT OF 1965?

In the instant case, the district court found that the complaining minority constitutes 11.06% of the total population of Liberty County. This percentage translates to 471 persons out of a total population of 4,260.

Historically, the focus of racial vote dilution actions concerned minority

groups that were not getting their "number's worth" in terms of political influence. In Whitcomb v. Chavis, 403 U.S. 124, 156 (1971), this Court stated that a group entitled to a remedy for vote dilution must be "numerous enough to command at least one seat and represent a majority living in an area sufficiently compact to constitute a single member district." (Emphasis added.) Logically, the smaller a group is as a percentage of the total population, regardless of its potential to constitute a majority of a single member district, the greater the danger of creating an entitlement to proportional representation, which is specifically disclaimed in section 2 of the Voting Rights Act.

Certainly it was not the intent of Congress in amending the Voting Rights

Act in 1982 to insulate any group from normal political defeat, and it becomes increasingly difficult to draw the line between normal political defeat and vote dilution when a minority's numbers do not constitute "a seat's worth" on a proportional basis. Mechanistic application of the Gingles factors affords no safeguards against the creation of a right to proportional representation.

Mechanically applying a 51%-of-any-possible-district test, as it appears Judge Kravitch would do is--purely and simply--proportional representation in its worst form. (Actually, it was not even a 51% figure on which many of the pre-Gingles decisions focused, but 65%--the percentage which appeared to be necessary to give an effective remedy in fashioning single-member districts.)

Justice O'Connor, in her Gingles concurrence, warned of this consequence in stating:

> [A]lthough the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single member districts.

478 U.S. at 85.

The instant case is a perfect illustration of how mechanical application of the Gingles factors creates a right to proportional representation. As stated above, the complaining minority herein constitutes only 11.06% of the total population of Liberty County. In other words, the total minority population is not only less than "a seat's

worth" on a proportional basis, it barely constitutes one-half the numbers represented by a seat as a percentage of the total population. Mechanical application of the Gingles factors to the instant case, as urged by Judge Kravitch, not only creates a right to proportional representation, but a right to disproportional representation. Stated differently, the complaining minority herein is given an entitlement to not only its "number's worth," but to almost twice its number's worth.

Under the Kravitch approach in this case, a tiny minority group, sufficiently concentrated within a political subdivision to give it a bare majority in a possible single-member district, would be entitled to its own seat under the Voting Rights Act. What, then, would prevent a

court from requiring the creation of more seats so as to accommodate an even tinier minority group? After all, the number of seats is also "a voting standard, practice, or procedure" which could give rise to a violation of the statute. That, however, is a right to proportional (or less than proportional) representation.

In section 2 of the Voting Rights Act, Congress unequivocally stated its disclaimer of any right to proportional representation: "Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973. Perhaps the real question here is, when and how, in terms of results, is a right to proportional representation created? Otherwise, the above-quoted language is a

nullity.

There is a compelling need for this Court to provide clarification and guidance concerning this issue, as impacted by the Gingles factors in the instant case, particularly if the mechanical approach of Judge Kravitch is adopted by this Court.

III. MAY AN THE COURT OF APPEALS MAKE CONCLUSIVE FACTUAL FINDINGS, AS A MATTER OF LAW, AS TO THE THRESHOLD FACTORS ADOPTED IN GINGLES, IN A CASE WHICH WAS TRIED BEFORE GINGLES WAS DECIDED, WHEN THE EVIDENCE WAS DISPUTED AND WHEN THE TRIAL COURT DID NOT MAKE FINDINGS AS TO ALL OF SUCH FACTORS?

The trial court herein made the following findings of fact:

1. North Florida and Liberty County have a long history of extensive official discrimination affecting the rights of blacks to participate in political

processes. (A220)

2. While the Respondents had established a statistically significant degree of racial bloc voting by black voters, there was no analysis of white voting patterns and no evidence of white and black preferences as to non-minority candidates; therefore, Respondents had not proven any legally significant racial polarization in terms of the Gingles standards. (A220-A237)

3. A party nomination majority vote requirement and the large size of Liberty County to cover in an at-large election may enhance the opportunity to discriminate against blacks in the election process. (A238)

4. Blacks have not been denied access to an existing informal slating process. (A239)

5. There is no significant impediment to black political participation in Liberty County, and black political participation in recent years has been substantial. (A243-A244)

6. Recent campaigns in Liberty County have not been characterized by overt or subtle racial appeals. (A246-A247)

7. No black has ever been elected to countywide office in Liberty County. (A247)

8. Although even the Respondents testified that the elected officials in Liberty County are approach-able and sensitive to the particularized needs of black citizens, a finding of a significant lack of responsiveness to the interests of blacks by Liberty County's elected officials was necessary, based

upon the school system's treatment of Mr. Stallworth in refusing to promote him to principal, as detailed in Stallworth v. Shuler, 35 F.E.P. 770 (N.D. Fla. 1984), aff'd 777 F.2d 1431 (11th Cir. 1985). (A248-A249)

9. At-large elections in Liberty County are in conformance with a State policy which is not tenuous and which was not racially-motivated. (A250-A253)

10. In a District drawn at the Respondents' request, containing virtually all the black residents of Liberty County, blacks still comprise only 49 percent of the population and 46.2 percent of the registered voters and could still not elect their own candidate in a completely racially-polarized districtwide election. (A253-A257)

11. Blacks in Liberty County are

perceived by all candidates as a 'swing vote' crucial to success, and--in spite of the treatment of Mr. Stallworth by the school system--white elected officials are available, responsive, and sensitive to black voters. (A257-A259)

12. Because of the 'swing vote' influence of black voters, many members of the Respondent class, including two of the four named Respondents, are ambivalent about or opposed to single-member districts, and believe their greatest political influence lies in an at-large election system. (A260-A261)

13. Based on the totality of the circumstances, blacks in Liberty County suffer no dilution of their votes as a result of at-large elections and do not have less opportunity than whites to participate in the election process and

to elect representatives of their choice. (A269-A276)

On appeal to a three-judge panel, the Court of Appeals unanimously vacated the judgment and remanded for further proceedings. (A195-A196) In an opinion authored by Judge Tjoflat, the Court interpreted Thornburg v. Gingles as establishing a four-step test for finding a Voting Rights Act violation based on vote dilution by an at-large election system. (A158-A159) (This test was not adopted by a majority of the Court of Appeals in the en banc decision.)

In arriving at its conclusions, the Tjoflat opinion disagreed with the trial court's findings of fact numbered above as 1, 2, 3, 4, 6, 8, 9 and 10. The disagreements primarily focused on the failure of the trial court to explain the

bases for some of the findings, the failure of the trial court to relate its findings to the four-step test espoused by Judge Tjoflat, or the trial court's characterization of the quality and credibility of the Respondents' evidence. (A172-A191) Judge Tjoflat's opinion also held that findings numbered above as 11 and 12 were not relevant to the ultimate determination expressed above as number 13 (A192-A195), and it directed a reconsideration of the evidence by the trial court. (A195-A196)

After rehearing en banc, the Eleventh Circuit Court's per curiam opinion held "as a matter of law, that the [Respondents] have satisfied the three Gingles factors" and remanded to the district court for further proceedings, without instructions because the

panel could not agree as to the effect of those three findings. (A2-A3) It is clear from references to two of the specially concurring opinions that the "three Gingles factors" referred to were: (1) that blacks were numerous and concentrated enough to control a single-member district; (2) that blacks in Liberty County are politically cohesive; and (3) that the whites in Liberty County vote sufficiently as a bloc that they are usually able to defeat the blacks' pre-ferred candidate. (A2, A18-A24, A42, A108)

It is also clear from the evenly-divided Court in this case that Gingles requires some clarification. Perhaps because the Court of Appeals was so intent on attempting to resolve its vastly-different interpretations of

Gingles, or because of its frustration in not being able to do so, the en banc per curiam opinion and remand violates several established legal precepts, beginning with the "clearly erroneous" standard set out in Rule 52(a), Federal Rules of Civil Procedure.

This Court, in Thornburg v. Gingles, at 478 U.S. 78-9, reaffirmed that the clearly erroneous standard applies not only to the subsidiary factual determinations in a voting rights case, but also to the ultimate factual conclusion of vote dilution because of multimember districts. In regard to the first Gingles threshold finding which the per curiam opinion held to have been proved as a matter of law (that a minority group is large enough and sufficiently concentrated to control a single-member

district), the trial court made exactly the opposite finding, based on its specific findings that blacks did not constitute a majority of the population, or a majority of the registered voter population, in the one Liberty County district where almost all of the County's black citizens resided.

In the original opinion of Judge Tjoflat, who also authored one of the specially concurring opinions after the en banc hearing, he incorrectly indicated that the trial court's conclusion on this issue was based on registered voting age population as being the determinative factor. However, it was both registered voter population and total population that the trial court used. (A254) Judge Tjoflat, in his original opinion, and Judge Kravitch, in her en banc concurring

opinion, nonetheless determined that the black voting age population for the same district was 51% (A20, A162) and that such a percentage was sufficient to meet the first Gingles standard. The trial court, however, made no finding of fact at all as to the black voting age population percentage in the district. It should be given the opportunity to do so, however, before this issue is resolved herein "as a matter of law."

This is particularly true since, as Judge Tjoflat's original opinion notes, the Gingles opinion "seems to refer simply to gross minority population" (A163) and neither the trial court herein nor the Respondents had the benefit of any different interpretation of the standard when this case was tried or decided. The only evidence in the record

as to percentage of black voting age population in District I was the Respondents' unverified estimate of 51%, which was not challenged by the Petitioners because of the 49% total population estimate. Nevertheless, it can be demonstrated from other information in the record, plus census data judicially noticeable, that the 51% estimate cannot possibly be correct.

Using figures found by the trial court and census data included in the Statement of the Case, if there are 423 blacks in District I and that number comprises 49% of the District I population, there are 863 total persons in the district, 440 of whom (51%) are white. Pursuant to the census, the Liberty County blacks tend to be slightly younger. (Only 66.24% of them are 18 or

older, compared to 70.66% of the whites; the countywide average is 70.20%.) Using the countywide average, of the 863 persons in District I, there are 606 persons of voting age. For 51% of that number to be black, as 'found' by the Court of Appeals, 309 of the County's 312 blacks of voting age would have to live in District I. That would mean only three of the 48 black persons living outside District I would be of voting age, or only 6.25% of them, but that would be less than one-tenth of the statistical average for blacks county-wide. It would also mean a great number of children living on their own outside of District 1!

Petitioners believe that it can be demonstrated from other census data (for the Enumeration Districts from which the

County's residency districts were created) that a 51% voting age majority in District I is not only extremely improbable, but statistically impossible. Such a demonstration, however, is more appropriately made at the trial court level. Suffice it to say that even Judge Tjoflat, in his original opinion, was hesitant to rely on the Respondents' unverified estimate and stated:

> On remand, the district court may make further inquiries into the exact demographics of the proposed District I to ensure that blacks will constitute a majority of its voting age population.
>
> (A201)

Nothing in the record has changed or been verified or become more reliable since the original appeal. If percentage of black voting age population is now to be <u>the</u> determinative factor, the trial court should be given the opportunity to

make a finding from the total record and any matters judicially noticeable as to the actual black voting age population percentage in the district. For the decision in this case to hinge on an unverified estimate of a number which, at the time of trial, was not a determinative factor because Gingles had not yet been decided, would be a total usurpation, "as a matter of law," of the trial court's fact-finding authority and capacity.

The Court of Appeals also held that the second and third Gingles standards had been established herein "as a matter of law." These standards are that blacks in Liberty County are politically cohesive and that whites vote sufficiently as a bloc as to usually defeat the blacks' preferred candidates. The trial court

had not made two separate findings on these issues. Instead, not having the benefit of any subsequent analyses and explanations of the Gingles opinion, the trial court found that voting in Liberty County was not "racially polarized". The Court's explanation of that finding was clearly that, while there was statistically significant evidence of black racial bloc voting, the Respondents had not proved that Liberty County racial bloc voting was legally significant in terms of a vote dilution challenge, meaning that there was no evidence of white bloc voting sufficient to usually prevent blacks from electing candidates of their choice. (A224-A237)

The Respondents' evidence on these issues was limited to a bivariate regression analysis, which the trial court

recognized as being an acceptable method of proving racial bloc voting in accordance with Gingles. (A228) The trial court, however, had several reservations as to the conclusions reached by the Respondents' one expert witness as a result of the data generated by the regression analysis (A225-A226, A230-A233), as well as the validity of the expert's inferences and assumptions (A233, A235-A236), and the court's reservations were supported by an expert witness called by the Defendants. (A223) In addition, the Respondents' expert only measured black voting patterns, not white, and the expert's own figures showed that, of the only four black candidates to ever have run for county-wide office in Liberty County, two of them received considerable white vote

(33% and 40.5%) in races against a single white opponent. (A210-A211)

Finally, there was no attempt by the Respondents or their expert witness to show how often the preferred candidates of Liberty County blacks were elected to office. The Respondents' figures merely showed that the only four black candidates ever to have run in Liberty County were supported by black voters but were defeated. The Respondents produced no evidence as to how many total candidates (both black and white), which were preferred by Liberty County black voters, had been elected or defeated. That, however, is the true test of a vote dilution claim, and the trial court's conclusion was supported by the record, while the Circuit's Court's factual finding "as a matter of law" was not.

In Gingles, this Court reaffirmed that the Voting Rights Act is intended to prohibit a majority from diluting the ability of members of a minority group to elect "representatives of their choice" --not "minority representatives of their choice"--and that it is the "status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important." 478 U.S. 68. The Eleventh Circuit Court, subsequent to Gingles, also has interpreted the Voting Rights Act in exactly this manner. Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1557 (11th Cir. 1987).

Nevertheless, the Eleventh Circuit here has substituted its opinion for that of the trial court and held that white voters in Liberty County will usually

vote sufficiently as a bloc so as to defeat the preferred candidates of black voters, and it has done so on a record which only shows that four particular candidates (who happened to be black) who were supported by black voters were defeated; that two of these candidates received considerable support from white voters; and that, while the Respondents produced no evidence as to black voters' success in all other Liberty County elections, the black voters are generally perceived in Liberty County as being the 'swing vote' likely to decide any race.

The trial court herein interpreted Gingles as requiring an ultimate finding of whether or not the black voters of Liberty County have suffered a vote dilution because of at-large elections, based on the totality of the circum-

stances. (A264-A269) Judge Tjoflat and four other Eleventh Circuit Judges read Gingles as requiring a four-step determination, with the totality-of-the-circumstances factors mentioned in Gingles and earlier opinions relating only to the third question. (A108, A158-A159) Judge Hill also views Gingles as not requiring single-member districts, no matter the findings as to the three threshold issues, when, as in Liberty County, single-member districts would lessen the political influence of black voters. (A122-A125) Judge Kravitch and four other Eleventh Circuit Judges interpret Gingles as requiring single-member districts whenever the three threshold factors are present, regardless of any other factor. (A26)

However, even though the Eleventh

Circuit Judges cannot agree as to what the law is that the trial court is to apply on remand in determining factual issues, it could be argued that the Circuit Court did not re-evaluate the weight and credibility of the evidence and substitute its judgment for that of the trial court, but that it merely set aside the trial court's findings for errors of law. Even in such a case, this Court has found to be "incredible" a Circuit Court's determination that it had the authority

> . . . to permit it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law. . . . [W]hen a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance.

Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982).

In Pullman-Standard, at 456 U.S. 292, the Court also held that a remand for further fact-finding is required when the trial court fails to make a relevant finding of fact, as in this case when the court made no finding as to the percentage of black voting age population in the relevant district.

Shortly after its decision in Gingles, this Court remanded another voting rights case for reconsideration in light of the Gingles opinion. Collins v. City of Norfolk, 478 U.S. 1016 (1986). The Fourth Circuit Court in that case, rather than make its own findings of fact based on its interpretation of Gingles, remanded to the trial court for further findings. Collins v. City of Norfolk,

816 F.2d 932 (4th Cir. 1987). That is exactly what the Court of Appeals should have done in this case.

Interestingly, the subsequent district court opinion in Collins v. City of Norfolk, 679 F.Supp. 557 (E.D. Va. 1988), appears to interpret Gingles much more clearly and straightforwardly than did any of the Eleventh Circuit Judges in this case. In fact, the ultimate district court decision in Collins is very similar to the district court decision in this case, since in Collins it was held that:

1. A mere preference for different candidates by different races is not legally significant. 679 F.Supp. at 566.

2. Polarized voting is not legally significant unless white bloc voting usually defeats minority-preferred

candidates. Id.

3. While regression analysis is acceptable as a method of proving racial bloc voting, the validity or probative value of any particular study may be undercut by methodological flaws. 679 F.Supp. at 571.

4. Unreliable figures and unreliable conclusions in a regression analysis may distort the results. 679 F.Supp. at 572.

5. It is a candidate's status as the choice of a minority racial group, not the candidate's race, which is of legal significance. Id.

6. In the City of Norfolk, in spite of a questionable bivariate regression analysis which established a pattern of racial bloc voting, more than half of all candidates receiving majority black

support were elected over an eighteen-year period. Id.

7. Determinations as to alleged Voting Rights Act violations cannot be made on a mechanical basis, but must be made based on the totality of the circumstances, which in turn, quoting Gingles, must be based on "a searching, practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process." 679 F.Supp. at 586.

The trial court in Collins was again reversed and remanded (on grounds not involved in the instant case) in Collins v. City of Norfolk, Va., 883 F.2d 1232 (4th Cir. 1989), and is now pending before this Court again on a granted Petition for Writ of Certiorari.

In spite of attempts by the Eleventh

Circuit Judges to reduce Gingles to one or another mechanical formula, the Gingles opinion clearly reinforces the pre-Gingles law that the totality of the circumstances determines the outcome of a Voting Rights Act Section 2 claim and that trial judges are much better suited, are in a much better position, and are more competent to make the factual findings necessary to determine the claim. In Rogers v. Lodge, 458 U.S. 613, 622-3 (1982), this Court held that Rule 52(a) makes no exceptions for different categories of findings; that the rule applies both to determinative findings and to subsidiary findings in a vote dilution case; and that findings of district court judges in such cases should not be set aside unless clearly erroneous,

> . . . 'representing as they do a blend of history and intensely local appraisal of the design and impact of the . . . multimember district in the light of past and present reality, political and otherwise.'

458 U.S. 622, quoting White v. Regester, 412 U.S. 755, 769-70 (1973).

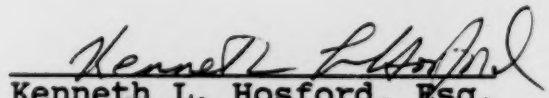
CONCLUSION

This post-Gingles case comes to this Court from an en banc decision of a Court of Appeals which reversed a district court finding of no violation of Section 2 of the Voting Rights Act. The Court of Appeals, however, was hopelessly deadlocked as to what, upon remand, Gingles required of the district court. Unless this Court resolves critical issues of federal law raised by the apparent ambiguity of Gingles, enormous burdens will be imposed upon the judiciary and untold litigation hours and expense will

be incurred in this and like cases.

The Petition for Writ of Certiorari should, therefore, be granted.

Respectfully submitted,



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